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12
13 **UNITED STATES DISTRICT COURT**
14
15 **NORTHERN DISTRICT OF CALIFORNIA**
16
17 **SAN FRANCISCO DIVISION**

18 IN RE CATHODE RAY TUBE (CRT)
19 ANTITRUST LITIGATION,

No. 07-cv-5944-SC
MDL No. 1917

20 This Document Relates to:

21 *Sharp Electronics Corp., et al. v. Hitachi,*
22 *Ltd., et. al., No. 13-cv-01173; and*

23 *Sharp Electronics Corp. et al. v. Koninklijke*
24 *Philips Electronics, N.V., No. 13-cv-2776.*

25
26
27
28 **RESPONSE OF DEFENDANTS**
THOMSON S.A., THOMSON
CONSUMER ELECTRONICS, INC.,
KONINKLIJKE PHILIPS N.V., PHILIPS
ELECTRONICS NORTH AMERICA
CORPORATION, AND THE TOSHIBA
DEFENDANTS IN OPPOSITION TO
SHARP'S MOTION IN LIMINE TO
EXCLUDE EVIDENCE RELATED TO
THE ROLE OF SHARP COMPANIES IN
THE TFT-LCD ANTITRUST
LITIGATIONS

1

2 **I. INTRODUCTION**

3 On November 12, 2008, Sharp Corporation pled guilty to participating in a conspiracy to
 4 fix the price of TFT-LCDs (“LCD Conspiracy”). The non-prosecution protection afforded to
 5 Sharp Corp. as part of its plea extended to the Sharp Plaintiffs in this matter. *See Plea Agreement*
 6 ¶ 15, *United States v. Sharp Corp.*, 3:08-cr-00802-SI (Dec. 17, 2008) (N.D. Cal.) (ECF No. 12)
 7 (“the United States agrees that it will not bring further criminal charges against the defendant *or*
 8 *any of its related entities* for any act or offense committed before the date of this Plea Agreement
 9 that was undertaken in furtherance of an antitrust conspiracy involving the manufacture or sale of
 10 TFT-LCD in the United States and elsewhere.”) (emphasis added). A TFT-LCD is a component
 11 used to manufacture televisions and/or computer monitors. Because of their participation in a
 12 conspiracy to fix the price of TFT-LCDs, Sharp Corporation and Sharp Electronics Corporation
 13 (“SEC”), a plaintiff in this case, are also defendants in the *In re TFT-LCD (Flat Panel) Antitrust*
 14 *Litigation*, No. 07-mdl-1827 (N.D. Cal.). In this action, SEC and Sharp Electronics
 15 Manufacturing Company of America, Inc. (“SEMA”) (collectively, “Sharp”) seek to recover
 16 hundreds of millions of dollars in damages they claim were caused to Sharp as a result of
 17 Defendants’ alleged anticompetitive conduct in the CRT market. Claiming that “none of the
 18 actions of any Sharp companies in the *TFT-LCD* litigations is relevant to the Sharp Plaintiffs’
 19 claims for damages resulting from their purchases ... of price-fixed CRTs,” Sharp now seeks a
 20 categorical ruling prohibiting the admission of evidence at trial regarding the participation of any
 21 Sharp company in the TFT-LCD antitrust conspiracy. (Sharp Mtn. at 6.)

22 Sharp’s motion should be denied [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED] (*See* Hausman Depo. at 232:15-233:13,
 26 236:116-238:4 attached as Ex. A.) Therefore, Sharp’s participation in the LCD conspiracy is
 27 directly relevant to an essential element of Sharp’s claims—[REDACTED]

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¹ Dr. Hausman was also Sharp’s expert in the TFT-LCD litigations.

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2 [REDACTED]
3 [REDACTED]. Sharp's motion focuses on the *Defendants'* expected introduction of Sharp's LCD
4 conduct; in doing so, Sharp ignores that the experts of its fellow plaintiffs—Drs. Netz and
5 Elzinga—place Sharp's anticompetitive LCD activities squarely at issue in their reports. In fact,
6 DAP expert Dr. Elzinga specifically refers to Sharp as an LCD conspirator and draws an express
7 link between the CRT and LCD markets.

8 Accordingly, evidence regarding Sharp's participation in the LCD Conspiracy, [REDACTED]

9 [REDACTED]
10 [REDACTED], is indisputably relevant and
11 admissible. Sharp's motion to categorically exclude TFT-LCD evidence for any purpose should
12 be denied.

13 **II. ARGUMENT.**

14 **A. Sharp's participation in the LCD conspiracy is relevant to determining
15 Sharp's alleged CRT damages.**

16 Evidence of Sharp's role in the LCD Conspiracy is relevant and admissible because [REDACTED]
17 [REDACTED]
18 [REDACTED]. In order to prevail on an
19 antitrust claim, a plaintiff must show that it has suffered some actual antitrust injury that was
20 caused by a defendant. *See First Beverages, Inc. v. Royal Crown Cola Co.*, 612 F.2d 1164, 1174-
21 75 (9th Cir. 1980) (holding that jury was properly instructed that it could not return a verdict in
22 plaintiff's favor without finding that defendant's conduct proximately caused some antitrust
23 injury). The burden to demonstrate antitrust damages rests with Sharp, and it must account for
24 any injuries that resulted from some cause other than Defendants' alleged antitrust violations.²
25 *See Knutson v. Daily Review*, 468 F.Supp. 226, 229 (N.D. Cal. 1979) (plaintiffs have the burden

26 ² Sharp's LCD conduct is also relevant to whether it acted in a commercially reasonable manner
27 to mitigate the amount of its alleged damages. *See MCI v. AT&T*, 708 F.2d 1081, 1162-63 (7th
28 Cir. 1983). Plaintiffs, including Sharp, moved to exclude evidence of their failure to mitigate
damages and Thomson and Philips incorporate herein by reference Defendants' opposition to that
motion.

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2 to prove both the fact of damage and the amount of damage); *In re TFT-LCD (Flat Panel*
 3 *Antitrust Litig.*, 2012 WL 5383203, at *1 (N.D. Cal. Sept. 22, 2012) (plaintiffs must show the
 4 extent of the financial impact of defendants' antitrust violation).

5 Sharp incorrectly assumes that evidence of any Sharp company's role in the LCD
 6 Conspiracy will be offered for an improper purpose, namely to demonstrate that Sharp's
 7 anticompetitive conduct in the LCD market insulates Defendants from liability in the present
 8 dispute. (Sharp Mtn. at 5.) This argument misses the mark, however, because while evidence
 9 regarding Sharp's participation in the LCD Conspiracy does not insulate Defendants from
 10 *liability* in this action, the evidence does relate directly to the cause and amount of Sharp's
 11 *damages*, and it is admissible for this purpose. *See, e.g., First Beverages*, 612 F.2d at 1175
 12 (plaintiff's anticompetitive conduct could be introduced "to disprove part or all of the claimed
 13 damages"); *U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1371 (2d Cir. 1988)
 14 (admitting evidence of plaintiff's anticompetitive conduct as relevant to defendant's damages
 15 defense); *Pearl Brewing Co. v. Jos. Schlitz Brewing Co.*, 415 F. Supp. 1122, 1131 (S.D. Tex.
 16 1976) ("evidence introduced by defendant of such conduct, if any, by a plaintiff which heretofore
 17 was labeled as '*in pari delicto*' now is appropriate when it provides rebuttal to that plaintiff's
 18 allegations of causation of injury by defendant and resulting damages therefrom"); *Datel Holdins*
 19 *LTD. v. Microsoft Corp.*, 2010 WL 3910344, at *3-4 (N.D. Cal. Oct. 4, 2010) (evidence of
 20 plaintiff's violation of the Digital Millennium Copyright Act was relevant to determining whether
 21 plaintiff suffered any antitrust injury); *RealNetworks, Inc. v. DVD Copy Control Ass'n*, 2010 WL
 22 145098, at *6 (N.D. Cal. Jan. 8, 2010) ("Real's purported injury stems from its own decision to
 23 manufacture and traffic in a device that is almost certainly illegal under the DMCA.... The court
 24 does not here hold that Real is barred from maintaining an antitrust claim because it has engaged
 25 in illegal activity; rather, the court holds that Real has failed to allege a plausible antitrust
 26 injury.").

27 For example, in *First Beverages* the Ninth Circuit held that a plaintiff's anticompetitive
 28 conduct could be introduced at trial "to disprove part or all of the claimed damages." 612 F.2d at
 1175. Defendants in that case sought to admit evidence of plaintiff's "truly complete
 RESPONSE OF THOMSON, PHILIPS, AND
 TOSHIBA DEFENDANTS TO SHARP'S MOTION IN
 LIMINE RE TFT-LCD ANTITRUST LITIGATIONS

1 involvement and participation in a monopolistic scheme” involving plaintiff’s illegal trucking
 2 operations, and plaintiff moved for summary judgment, or in the alternative, for an order in
 3 limine excluding defendant’s *in pari delicto* defense. *Id.* at 1172. The Ninth Circuit held that the
 4 Supreme Court’s decision in *Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 392 U.S. 134 (1968),
 5 a decision Sharp relies on in support of its motion, did not bar the introduction of evidence
 6 regarding plaintiff’s anticompetitive conduct for purposes of addressing plaintiff’s alleged
 7 damages. *Id.* at 1175 (“[Defendant] introduced evidence of illegality not to prevent the
 8 [plaintiffs] from presenting any case at all, but to show that some or all of the alleged lost profits
 9 would never have materialized.”). The Ninth Circuit emphasized that *Perma Life* did not
 10 foreclose the possibility that evidence of a plaintiff’s anticompetitive conduct could be admitted
 11 for purposes other than an *in pari delicto* or an unclean-hands defense: “*Perma Life...* teach[es]
 12 that private wrongdoing should not be a bar to an action for the public wrong of violating the
 13 antitrust laws. [It does] not foreclose the introduction of evidence for purposes other than to show
 14 an antitrust plaintiff’s improper conduct.” *Id.* at 1173; *see also U.S. Football League*, 842 F.2d at
 15 1369 (*citing Perma Life*, 392 U.S. at 139; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*,
 16 340 U.S. 211, 214 (1951)) (“Neither *Perma Life* nor *Kieger-Stewart* suggests that otherwise
 17 admissible evidence must be excluded because it might also be relevant to an *in pari delicto* or
 18 unclean-hands defense.”). In fact, the *Perma Life* decision cited in Sharp’s brief explicitly
 19 provides that such evidence “can of course be taken into consideration in computing damages.”
 20 *Perma Life*, 392 U.S. at 140.

21 Sharp attempts to downplay its role in the LCD Conspiracy³ and argues that there is “no

22

23 ³ Sharp points to Sharp Corporation’s guilty plea and argues that the scope of its LCD-
 24 related conduct was limited to computer monitors and laptops, portable music players, and mobile
 25 phones. (Sharp Mtn. at 2-3.)

26 *See, e.g., Ex. B* (SHARP-CRT-00260588)

27 (██████████); *Ex. C* (SHARP-CRT-00260502)

28 (██████████). In any event, Sharp can offer evidence
 at trial if it contends that the conduct of any Sharp company with respect to LCDs did not
 contribute to the damages Sharp plaintiffs are seeking to recover here. In the LCD matter, Sharp
 argued that information exchanges were not, by their nature, anticompetitive and defended much
 of its conduct. *See, e.g.*, Sharp Corp.’s Response to Indirect Purchaser Plaintiffs’ Objections to
 Special Master’s June 14, 2011 Order re Requests for Admission at 5, *In re TFT-LCD (Flat*
 RESPONSE OF THOMSON, PHILIPS, AND 4 *TFT-LCD Antitrust Litigation*

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2 link" between its participation in the LCD Conspiracy and the present dispute regarding CRTs.

3 (Sharp Mtn. at 1.) [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 *Panel) Antitrust Litig.*, No. 07-md-01827 (N.D. Cal. July 8, 2011), Dkt. 3054. ("Exchanges of
26 price information have an ambivalent status under the antitrust law. On the one hand, 'the
27 dissemination of price information is not itself a *per se* violation of the Sherman Act.' . . . On the
28 other hand, '[i]nformation exchange is an example of a facilitating practice that can help support
an inference of a price-fixing agreement.'") (citations omitted). The Defendants should not be
precluded from raising Sharp's views on information exchanges in LCD to counter Sharp's
arguments that the Defendants' information exchanges were anticompetitive.

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2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7

(Ex. A , Hausman Depo. at 236:116-238:4 (emphasis added).)

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED] See Ex. E, Expert Report of Dr. Kenneth G. Elzinga, April

12 15, 2014, at 48 ([REDACTED]); Ex. F, Reply Expert

13 Report of Dr. Kenneth G Elzinga, August 5, 2014, at 9 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]); Ex. G, Expert Report of Janet

17 S. Netz, April 15, 2014, at 103–105 ([REDACTED]

18 [REDACTED]).

19 [REDACTED]

20 [REDACTED]

21 As the ABA Model Jury Instruction on Causation and Damages in Civil Antitrust

22 Cases provides:

23

If you find that defendant[s] violated the antitrust laws and that [Sharp] was injured by that violation, [Sharp] is entitled to recover for such injury that was the direct and proximate result of the unlawful acts of defendant[s]. [Sharp] is not entitled to recover for injury that resulted from other causes.

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...

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[Sharp] bears the burden of showing that its injuries were caused by defendant's alleged antitrust violation – as opposed to any other factors, such as those that I just described to you. If you find that [Sharp's] alleged injuries were caused by factors other than defendant's alleged antitrust violation, then you must return a verdict for defendant. *If you find that [Sharp's] alleged injuries were caused in part by defendant's alleged antitrust violation and in part by other factors, then*

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2 you may award damages only for that portion of [Sharp's] alleged injuries that
 3 were caused by defendant's alleged antitrust violation.

4 **Ex. D.**, ABA Section of Antitrust Law, *Model Jury Instructions in Civil Antitrust Cases* at F-18
 5 (2005 ed.) (emphasis added). Thus, [REDACTED]
 6 [REDACTED]

7 [REDACTED] that evidence is relevant to determining whether the damages Sharp seeks
 8 to recover here were caused solely by Defendants' alleged antitrust violation, or were caused, in
 9 whole or in part, by other factors. Simply stated, because Sharp participated in a conspiracy
 10 regarding a substitute for CRTs, Defendants are entitled to establish at trial [REDACTED]

11 [REDACTED] Accordingly,
 12 evidence regarding Sharp's participation in the LCD Conspiracy is highly relevant to its claims in
 13 the instant action and its motion should be denied.

14 **B. Defendants may impeach Dr. Hausman with prior opinions he has offered,
 15 including those from the LCD litigation.**

16 Sharp also seeks to preclude Defendants from referencing Dr. Hausman's testimony (or
 17 retention by Sharp) in the LCD litigation. (Sharp Mtn. at 8.) As with any expert, Defendants are
 18 entitled to impeach Dr. Hausman to the extent he has offered opinions in prior engagements,
 19 including LCD, that are inconsistent with or contradictory to those Dr. Hausman intends to offer
 20 at trial. *See, e.g., Ortiz-Lopez v. Sociedad Espanola de Auxilio Muto y Beneficia de P.R.*, 248
 21 F.3d 29, 34-35 (1st Cir. 2001) (expert's prior testimonial experience in cases involving similar
 22 claims was "directly at issue"); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 2009 WL
 23 3247432, at *1 (S.D. Tex. Sept. 29, 2009) ("A party is entitled to explore 'potential
 24 inconsistencies between the views [the expert] intends to express in the underlying case, and the
 25 testimony and opinions he has given, and the damages theories and methodologies he had
 26 adopted' in prior cases or on related subjects."); *Expeditors Int'l of Washington, Inc. v. Vastera,*
 27 Inc., 2004 WL 406999, at *2 (N.D. Ill. Feb. 26, 2004) (expert's prior testimony on similar issues
 28 is directly relevant to present litigation); *Phillips v. Raymond Corp.*, 213 F.R.D 521, 524 (N.D.
 29 Ill. 2003) ("bias is of course one the quintessential bases for impeachment of a witness—it is

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2 always available to the cross-examiner"). For example, the excerpt of Dr. Hausman's testimony
3 that Sharp attached to its motion shows that Dr. Hausman was critical of the Plaintiffs' expert in
4 LCD for not disaggregating sales data. (Sharp Mtn., Ex. C.) [REDACTED]

5 [REDACTED] (Ex. A, Hausman Depo. at
6 140:13-41:25.) Defendants are entitled to explore these and other inconsistencies or
7 contradictions through impeachment of Dr. Hausman at trial, even if they relate to his testimony
8 as an expert for Sharp in LCD. Thus, Sharp's request to preclude Defendants from referencing
9 Dr. Hausman's role or testimony in the LCD litigation should be denied.

10 **C. Evidence of Sharp's role in the LCD Conspiracy is not unfairly prejudicial,
11 and the Court can consider the prejudicial impact of individual documents
12 during trial.**

13 Instead of identifying specific documents and explaining why they are prejudicial, Sharp
14 categorically argues that all evidence related to the involvement of Sharp companies in the events
15 underlying the *TFT-LCD* litigations is unduly prejudicial. (Sharp Mtn. at 7-10.) Such motions
16 are routinely denied as too sweeping in scope. *See, e.g., Lego v. Stratos Int'l, Inc.*, 2004 WL
17 5518162, at *1 (N.D. Cal. Nov. 4, 2004) (motion to exclude opinion testimony of "any
18 individual" who is not disclosed as an expert "is denied because the requested relief is too
19 vague"); *Weiss v. La Suisse, Societe D'Assurances Sur La Vie*, 293 F. Supp. 2d 397, 407-08
20 (S.D.N.Y. 2003) (denying motion in limine where "[n]o particular documents or testimony have
21 been identified"). Vague generalities without context, such as those offered by Sharp here, are
22 not sufficient to justify a categorical exclusion of evidence. *See Maharaj v. Cal. Bank & Trust*,
23 288 F.R.D. 458, 462 (E.D. Cal. 2013) (denying motion to exclude "any and all" testimony,
24 reference to testimony, or argument regarding exhaustion of administrative remedies); *U.S. v.
25 Peel*, 2014 WL 5501268, at *4 (E.D. Cal. Oct. 30, 2014) ("The scope of this motion is too unclear
26 for an in limine ruling."); *Robinson v. HD Supply, Inc.*, 2014 WL 585416, at *3 (E.D. Cal. Feb.
27 14, 2014) ("Since it is unclear precisely what evidence Defendant seeks to exclude, this motion is
28 too conclusory to justify an in limine ruling.").

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Rather than requesting a blanket exclusion of all documents relating to Sharp's role in the LCD Conspiracy and related litigation, Sharp must identify specific documents and demonstrate that they are either irrelevant or unfairly prejudicial. To the extent that Sharp has specific concerns about such documents, the Court should reserve its ruling until trial, when the evidentiary issues can be viewed in their factual context. *See, e.g., Colton Crane Co. v. Terex Cranes Wilmington, Inc.*, 2010 WL 2035800, at *1 (C.D. Cal. May 19, 2010) ("motions *in limine* should rarely seek to exclude broad categories of evidence, as the court is almost always better situated to rule on evidentiary issues in their factual context"); *Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 712 (6th Cir. 1975) ("A better practice is to deal with questions of admissibility of evidence as they arise."). In fact, Sharp itself cited the opinion in *Colton Crane* in its opposition to Defendants' MIL No. 3 (seeking the exclusion of references to the DOJ's CRT investigation) to support its argument that Defendants' motion was "premature and overbroad." Sharp's Opp. to Defs' Mot. in Limine No. 3 (ECF No. 3665). Sharp cannot have it both ways.

Sharp's attempt at differentiating "Sharp Corp." and its LCD guilty plea from the plaintiffs in this case is unavailing. Sharp Corp. is the parent of the entities in this case. As stated above, Sharp Corp.'s bargained-for non-prosecution protection extended to the plaintiffs in this case. In fact, this Court has already held that "Sharp's claims are based partly on its corporate relationship with Sharp Corporation . . . [T]he Sharp Plaintiffs' purchases that form the basis of their antitrust claims against Toshiba were made from Sharp Corporation." Order Granting Toshiba's Mot. to Dismiss Sharp's First Amended Compl. at 8 (ECF No. 2435).

Moreover, as with any evidence, the Court has broad discretion to determine whether the probative value of the evidence is "substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury." Fed. R. Evid. 403. And in similar circumstances, evidence related to a plaintiff's alleged damages has been found to be more probative than prejudicial. *See, e.g., U.S. Football League*, 842 F.2d at 1369-70 (holding that evidence of plaintiff's business decisions pursuant to a merger strategy was "highly probative on the central issue of whether the [plaintiff] alleged injury and damages," and was not outweighed by the potential for unfair prejudice). To the extent that Sharp is concerned about particular documents

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2 or pieces of evidence, it can renew this motion during trial, when the Court can consider the
3 evidence within its complete factual context, and determine whether a limiting instruction would
4 be appropriate to address Sharp's concerns. *Id.* at 1370-71 (limiting instruction was sufficient to
5 ensure that jury did not consider evidence for an improper purpose); *see also U.S. v. Gomez-*
6 *Rodriguez*, No. 95-10168, 91 F.3d 156 (9th Cir. 1996) ("a limiting instruction is
7 generally sufficient to cure any prejudice to [a party]").

8 III. CONCLUSION

9 For the foregoing reasons, the Court should deny Sharp's motion. To the extent that
10 Sharp has concerns about the prejudicial effect of a particular item of evidence, the Court should
11 reserve ruling until trial, when it can consider the evidentiary issues in their factual context and
12 determine if a limiting instruction would be sufficient to allay Sharp's concerns.

13
14 Dated: February 27, 2015

Respectfully submitted,

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